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No. 95-6510 (4)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

v.

J. D. NETHERLAND, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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37 pp

QUESTIONS PRESENTED

I. Should this Court grant certiorari to review a claim which the Fourth Circuit held was barred by the "new rule" doctrine and which, in any event, is barred by the petitioner's procedural default in state court?

II. Is petitioner's so-called Brady claim properly before this Court when he never appealed to the Fourth Circuit the district court's ruling that the claim was both procedurally barred and without merit?

III. Does petitioner's claim regarding the alleged "vagueness" of Virginia's "vileness" aggravating circumstance fail to raise a cognizable federal issue?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Coleman Wayne Gray was convicted and sentenced to death on February 3, 1986, after a jury trial in the Circuit Court of the City of Suffolk, Virginia, for the capital murder in the course of robbery while armed with a deadly weapon of Richard M. McClelland.

The jury's death verdict, upon which the trial court entered judgment, was based upon findings of both predicates of Virginia's death penalty statute, i.e., "vileness" and "future dangerousness." On direct appeal, the Supreme Court of Virginia affirmed the death sentence on both grounds. Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157 (1987).

Pertaining to Gray's trial in state court, the following facts were found by the Supreme Court of Virginia in its direct review of Gray's conviction and death sentence:

> Both Gray and Melvin Tucker were indicted for capital murder. Afterwards, the Commonwealth's Attorney elected to try only Gray on the charge of capital murder and entered into a plea bargain with Tucker whereby he would be tried on a charge of first-degree murder.

233 Va. at 331, 356 S.E.2d at 166-67.

> [R]ichard McClelland was the manager of Murphy's Mart Store in the City of Portsmouth. He and the store's security guard worked late the evening of May 2, 1985, both having arrived at the store between 9:30 and 10:00 a.m.
>
> On the same evening, approximately 9:30 p.m., Gray and Melvin Tucker, both "high" from "free basing" cocaine, entered the parking lot of Murphy's Mart in Gray's automobile to observe the store. They saw McClelland and the guard inside the store.
>
> Shortly before midnight, McClelland and the security guard left the store in separate automobiles. Gray and Tucker followed them in Gray's automobile, which Gray was driving. McClelland and the guard went to a fast-food restaurant. McClelland went inside the restaurant, and the security guard went through the "drive-thru" and then left. When McClelland left the restaurant, he drove toward Smithfield. Gray and Tucker continued to follow him. At a stop sign at the intersection of Nansemond Parkway and Bennett's Pasture Road, Gray pulled his automobile in front of McClelland's car and blocked McClelland's way. Gray, armed with a .32-caliber revolver, directed McClelland to get out of his automobile and into Gray's. Gray struck McClelland, and the two men took McClelland's wallet and threatened to harm his family if he did not cooperate. Gray then drove Tucker and McClelland back to the Murphy's Mart Store.
>
> When they arrived at Murphy's Mart, Gray forced McClelland at gunpoint into the store while Tucker waited outside in Gray's automobile. Approximately one-half hour later, Gray and McClelland emerged from the store with a shopping cart containing three gym bags filled with money. Gray, Tucker, and McClelland put the gym bags in the back seat of Gray's

automobile and McClelland was told to get back into the car.

Gray then drove to a service station to obtain gasoline. He put some gas in the tank of the car and filled a gas can that was in the car's trunk.

After paying for the gas purchase, Gray drove McClelland and Tucker to the Frederick Campus of Tidewater Community College. After passing the college, Gray backed the car down a small side road and ordered McClelland out of the car. Gray then took McClelland to a place approximately 15 to 20 feet behind the automobile and ordered him to lie down on the ground. McClelland obeyed Gray's command.

McClelland begged Gray not to hurt or shoot him, and Gray assured him that he would not be harmed. As McClelland lay face down on the ground, Gray fired six pistol shots in rapid succession into McClelland's head from a distance of 3 to 18 inches. Gray told Tucker as they drove away that he had had to kill McClelland because McClelland knew him.

Gray and Tucker then drove to the intersection where they had left McClelland's car. Gray told Tucker that he was going to burn McClelland's car to destroy evidence. Gray took the can of gasoline from the trunk of his car and doused the interior of McClelland's automobile with gasoline. He lit a match, threw it into McClelland's car, and closed the door. Gray and Tucker subsequently returned to Gray's apartment to count the stolen money, which amounted to between $12,000 and $13,000.

Some days later, Tucker and Gray went to the Nansemond Treatment Plant where Tucker was employed, and Gray threw the revolver into a contact tank. The police later recovered the revolver after Gray showed them its location.

The police discovered McClelland's body at the scene of the crime on the morning of May 3 just a few hours after he had been shot. An autopsy performed later that day established that McClelland had received six close-range .32 caliber gunshot wounds to the head, any one of which could have caused his death.

233 Va. at 340-42, 356 S.E.2d at 172-73.

During the penalty phase of the trial, Melvin Tucker testified that Gray told him he had "knocked off" Lisa Sorrell. According to Tucker, Gray made the statement as he pointed to a picture of Lisa Sorrell in a newspaper while searching for news articles concerning McClelland's murder.

Over Gray's objection, the court permitted the Commonwealth to present additional evidence showing that the two Sorrell murders actually had occurred. The police officer who had investigated the murders testified that he found the body of Lisa Sorrell slumped in the front passenger seat of a partially burned automobile in Chesapeake, a city that shares borders with Suffolk. In the trunk of the automobile was the body of Lisa's three-year-old child, Shanta Sorrell. The officer identified various photographs of the automobile and the victims. The photographs were admitted into evidence.

A State medical examiner who had performed autopsies on the bodies of Lisa and Shanta Sorrell testified about the cause of their deaths. He opined that Lisa was killed by six gunshot wounds to the head, apparently inflicted by a .32-caliber firearm, and that Shanta died of carbon monoxide inhalation. Gray, testifying in the penalty phase, denied any involvement in the Sorrell murders.

233 Va. at 345-46, 356 S.E.2d at 175.

> [T]he evidence of the police officer and the medical examiner indicated that the Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder. Lisa Sorrell also was shot six times in the head, and her automobile, like McClelland's, was burned after the murder. Thus, the officer's and doctor's evidence tended to corroborate Tucker's testimony of Gray's admission.

* * *

Gray, 28 years old at the time of his trial, has a criminal record dating to 1973. In August 1973, while a juvenile, he was found not innocent of petit larceny and ordered to complete one year of supervised probation. In January 1976, as an adult, Gray was convicted of burglary in Los Angeles, California. For this conviction, he served four days in jail and was placed on probation for one year.

In March, 1977, Gray was convicted of disturbing the peace and resisting arrest in the City of Portsmouth, for which he was fined $10.00 and sentenced to five days in jail. The jail sentence was suspended on the condition that he be of good behavior for 12 months.

In May 1978, also in the City of Portsmouth, Gray was found guilty of malicious wounding, attempted robbery, and use of a firearm. He was sentenced to a total of 21 years in prison. In August 1983, he was released on parole. Gray was on parole at the time he committed the offenses involved in these appeals. He also has been convicted of possession of marijuana with intent to distribute and possession of cocaine.

From November 1983 to May 1984, while on parole, Gray worked at Morrison's Cafeteria. William Palmer, general manager of the cafeteria, testified that Gray's employment was terminated because of his use of profanity. Palmer stated that Gray had a "bad attitude." Thaddeus Eley, a chef at the cafeteria, testified that Gray had told him that he "could kill" Palmer for firing him.

Ronald Whitte testified that in July 1977, while he, his wife, and two small children were bicycling, Gray and another man accosted them. Gray displayed a pistol, ordered Whitte to halt, threatened to kill Whitte, and demanded money from him. When Whitte refused to comply, Gray fired several shots from the pistol, wounding Whitte in the arm and foot.

Lawrence Tucker, who is Melvin Tucker's brother and a convicted felon, testified that, in May 1985, he had overheard Gray recount to Melvin the details of Gray's robbery of the Circle Seafood Restaurant. Gray related the incident to relieve Melvin Tucker's concerns about the Murphy's Mart robbery. Lawrence Tucker stated, "[H]e told Melvin don't worry about it, because he got away with something like that and he can get away with this."

Melvin Tucker testified that Gray told him "he had took the Circle Restaurant off" and showed Tucker the money taken in that robbery. Melvin Tucker also testified that, within a week after the Murphy's Mart robbery, he and Gray heard a rumor that a young woman had been talking about the incident. When they saw the woman on the street, Gray told Tucker that if "she keep on running her mouth [I'm] going to fuck her up."

> Sylvester Joyner and Gray were both incarcerated in the same cell block in the Suffolk City jail. Joyner testified that Gray told him that he had to leave California because "he had killed a guy out there." The jury also heard evidence pertaining to the Sorrell murders, which has been discussed in the preceding section.

233 Va. at 347-48, 356 S.E.2d at 176-77.

Gray's pro se petition for certiorari review in this Court was denied on October 5, 1987. Gray v. Virginia, 484 U.S. 873 (1987).

In July, 1988, Gray filed in the Circuit Court for the City of Suffolk a petition for a writ of habeas corpus alleging 20 claims. Gray twice sought and was granted leave to file amendments adding additional claims to his state habeas petition. One of his claims contended that the circuit court had erred in admitting the evidence describing the Sorrell murders, but in his oral argument in the state habeas court on respondent's motion to dismiss, Gray expressly told the court that his Sorrell murders claim was a "legal claim" which did not require any new evidence to be taken in support of it, other than possibly evidence concerning its effect on the jury. The circuit court dismissed all Gray's claims without an evidentiary hearing, and entered final judgment in favor of respondent on May 14, 1990.

In his petition for appeal to the Supreme Court of Virginia from the denial of habeas corpus relief, Gray never contended that the circuit court erred in denying him an evidentiary hearing on his Sorrell murders claim, but simply urged the Supreme Court to revisit its decision on direct appeal that evidence of the unadjudicated Sorrell murders had been properly admitted in his trial. The Supreme Court of Virginia refused Gray's petition for appeal in a final order entered January 11, 1991. This Court again denied certiorari review on May 28, 1991. Gray v. Thompson, 111 S. Ct. 2250 (1991).

Gray filed his federal habeas petition in the Eastern District of Virginia on November 26, 1991. In his federal petition, he stated his claim concerning admission of evidence of the Sorrell murders in the penalty phase of his trial in the most general of terms:

> Introduction of evidence at the sentencing phase of the trial that Gray had committed other crimes of violence for which he had not been adjudged guilty violated his constitutional rights under the Fifth, Eighth and Fourteenth Amendments.

There followed a broad recitation of factual allegations with only the following conclusory statement to suggest a legal theory upon which the factual allegations might support habeas corpus relief:

> The use of proof that Gray was involved with the murders of Lisa and Shanta Sorrell was outrageously unfair, and highly prejudicial to Gray and violated his constitutional rights under the Fifth, Eighth and Fourteen Amendment rights [sic].

On April 1, 1993, the district court issued a final order and memorandum opinion dismissing Gray's federal petition. Gray subsequently filed a motion to alter or amend judgment which the district court granted in part. In its memorandum opinion of May 26, the district court affirmed each of its rulings of April 1 but discerned the following additional claim which, according to the district court, required an evidentiary hearing:

> On the morning the trial commenced, the Commonwealth's Attorney told Gray's counsel that he would present "statements" made by Gray to third parties that he committed the murders of a mother and daughter, Lisa and Shanta Sorrell. Immediately after the guilt phase of the trial, Gray's counsel was informed that the Commonwealth would present color photographs of the victims and detailed testimony of the autopsies and circumstances of the murders the next day, during the penalty phase, to prove that Gray had also committed the Sorrell murders.
>
> The Sorrells were murdered in December, 1984, twelve months before Gray was tried and convicted of the murder of Richard

> McClelland. At the time of Gray's trial, these murders remained unsolved. The only evidence that Gray committed these crimes was the testimony of Melvin Tucker, Gray's co-defendant, that after the McClelland murder, Gray also told him that he had killed the Sorrells.
>
> The next day, during the penalty phase, Tucker was permitted to recount Gray's alleged confession to the Sorrell murders for the jury. With nothing more than this to link Gray to the crimes, the Court, as noted above, then permitted the prosecution to put before the jury every graphic detail of the Sorrell murders, even though Gray had never been charged or convicted of such crimes.

Respondent then filed a motion for summary judgment on this new "claim." In the alternative, if summary judgment was denied, the respondent moved the court to permit an interlocutory appeal under 28 U.S.C. § 1292(b), and if that was denied, to enter an order in limine clarifying the issue to be tried at a plenary hearing, and specifying the nature of evidence that would be material to the issue. On September 8, 1993, the district court issued an order and memorandum opinion denying respondent any relief on this motion, but stating that the evidentiary hearing was to address the issue of "whether the evidence presented in regard to the Sorrell murders was in fact reliable."

On March 11, 1994, respondent filed a second motion for summary judgment specifically addressing the issue identified by the district court on September 8, 1993. At the outset of the evidentiary hearing on April 21, 1994, the district court announced that respondent's second motion for summary judgment "ha[d] not been granted," and that the issue to be decided at the evidentiary hearing was not confined to the factual reliability of Melvin Tucker's testimony about Gray's admission of responsibility for the Sorrell murders, but would be substantially broader.

In its final order of August 25, 1994 granting habeas corpus relief, the district court concluded that the trial court's decision to admit the Sorrell crime scene photographs, autopsies,

and the testimony of Detective Slezak describing the Sorrell crime scene, as to which Gray claimed surprise but in which he never alleged or proved any factual inaccuracy or unreliability, prevented Gray from effectively cross-examining Melvin Tucker, whose testimony Gray claimed was false, but as to which Gray did not and could not claim surprise. The district court then concluded that, although Melvin Tucker had testified in person and been cross-examined in the presence of the jury, the purported defect which the court had found rendered the "Sorrell murders" evidence as a whole constitutionally "unreliable."

The respondent appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, and Gray cross-appealed the district court's denial of relief on several of his other habeas claims. On June 28, 1995, the Fourth Circuit issued its published opinion reversing the district court's grant of habeas relief on the Sorrell murders claim and affirming its denial of relief on all of Gray's other claims. With respect to the Sorrell murders claim, the Fourth Circuit held that the district court's ruling had not been compelled by Gardner v. Florida, 430 U.S. 349 (1977), upon which it was purportedly based, that other precedent existing at the time Gray's conviction became final counseled affirmatively against the district court's decision, and that Gray's contention with respect to the Sorrell murders' evidence "rings hollow on its facts." Gray v. Thompson, 58 F.3d 59, 66 (4th Cir. 1995).

Judge Hall's concurring opinion, while it disagreed with the majority on the application of the new rule doctrine, would have rejected Gray's claim in any event because he "clearly failed to request that evidence regarding this matter be taken by the state habeas court," and the claim would therefore "be procedurally barred by the rule in Keeney v. Tamayo-Reyes, 504 U.S. 1 [parallel citations omitted] (1992)." 58 F.3d at 68 (Hall, J., concurring).

With respect to Gray's present claim based on Brady v. Maryland, 373 U.S. 83 (1963), the district court ruled this claim procedurally barred and meritless. Gray never appealed that ruling to the Fourth Circuit and, understandably, the Court of Appeals' opinion never addressed this claim.

The Fourth Circuit rejected Gray's attack on Virginia's "vileness" aggravating circumstance, finding that the statute, together with the narrowing definitions announced in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), satisfied this Court's requirements established in Godfrey v. Georgia, 446 U.S. 420 (1980).

ARGUMENT

I. NO ISSUE WORTHY OF CERTIORARI REVIEW IS PRESENTED BY THE FOURTH CIRCUIT'S ROUTINE APPLICATION OF THE NEW RULE DOCTRINE.

In Caspari v. Bohlen, this Court made clear that federal courts must analyze whether a habeas petitioner seeks to extend the boundaries of existing law before considering the merits of the claim, when the respondent so argues. 114 S.Ct. 948, 953 (1994). The Fourth Circuit followed this mandatory framework, which the district court had overlooked, and correctly found that Gray's rule "would be novel even today and certainly was not compelled by existing precedent at the time his conviction became final." 58 F.3d at 64.

The impermissible "new rule" created by the District Court in this case is threefold: first, it would have imposed a constitutional requirement that state prosecutors disclose to defendants in advance individual items of evidence to be offered by the prosecution at sentencing to prove unadjudicated acts of misconduct on the part of the defendant; second, it would have

permitted federal habeas corpus relief to be granted based on the prosecution's failure to disclose such evidence, no matter how reliable, if the petitioner contends that its advance disclosure would have been helpful to him in cross-examining a witness whose testimony had in fact been disclosed to him in advance; third, it would have permitted a federal habeas court to second-guess a jury's determination of the credibility of a live witness who was cross-examined in the presence of the jury, based upon rumors, hearsay, and innuendo which trial counsel had notice of, but deemed unworthy of investigation, but which federal habeas counsel chose to present years later in an attempt to impugn the witness' testimony.

The district court's ruling purportedly was based on Gardner v. Florida, and on Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), aff'd on other grounds, 451 U.S. 454 (1981), which itself was based on Gardner. Gardner, of course, held unconstitutional a sentencing proceeding in which the defendant was sentenced "on the basis of information that he had no opportunity to deny or explain." 430 U.S. at 362. As the Fourth Circuit held in this case:

> Petitioner, by contrast, was not sentenced on the basis of any secret information. Rather, the evidence of petitioner's future dangerousness was advanced in open court, and petitioner's counsel was afforded the chance to cross-examined the adverse witnesses [citation omitted]. Indeed, defense counsel cross-examined Detective Slezak, who had been interviewed the preceding evening, and chose not to cross-examine Dr. Presswalla after stipulating as to his competence. If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made; counsel moved only that the evidence be excluded. And, after the supplemental Sorrell evidence was presented, petitioner took the stand and directly addressed the jury. Plainly, petitioner had an opportunity to explain or deny the evidence. This case is thus distinguishable from Gardner on first principles.

58 F.3d at 64 (emphasis in original).

"Gardner itself warned against broad expansions of its holding." Gray, 58 F.3d at 64. Cautioning that its conclusion that due process applied in the sentencing process "does not, of course, implicate the entire panoply of criminal trial procedural rights," 430 U.S. at 358, n.9, Gardner found "a significant" distinction in the situation considered in Williams v. New York, 337 U.S. 241 (1949), wherein the sentencing judge had described in detail in open court the information in the presentence report upon which he relied. 430 U.S. at 356.

Moreover, in Sawyer v. Smith, 497 U.S. 227 (1990), this Court rejected a petitioner's reliance upon Gardner for the general proposition of "reliability in capital sentencing" as dictating the result later reached in Caldwell v. Mississippi, 472 U.S. 320 (1985), cautioning that "the [new rule] test would be meaningless if applied at this level of generality." 497 U.S. at 236. Clearly, the same is true of Gray's suggestion that the rule he advocates was dictated by Gardner.

Smith v. Estelle, decided prior to the announcement of this Court's new rule jurisprudence, expanded on Gardner by holding that "[s]urprise can be as effective as secrecy in preventing effective cross-examination." 602 F.2d at 699. The Fourth Circuit's conclusion that, in light of Teague, it was no longer free to make the same "leap in extending Gardner" made by the Fifth Circuit in Estelle, was a routine and clearly correct application of the new rule doctrine. See Gray, 58 F.3d at 65.

Such decisions as Profitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983), show that at the time of Gray's case, reasonable judicial minds could conclude that Gardner does not dictate the result reached in Estelle, or by the district court in this case. This conclusion is further supported by the Fourth Circuit's correct observation that

other precedent existing at the time Gray's conviction became final counseled affirmatively against extending Gardner to require advance notice as did the district court. See Weatherford v. Bursey, 429 U.S. 545 (1977) (no general constitutional right to discovery in a criminal case); United States v. Agurs, 427 U.S. 97 (1976) (mere possibility that an item of undisclosed information might have helped the defense does not establish materiality in the constitutional sense).

Gray's reliance on Blackmon v. Scott, 22 F.3d 560 (5th Cir.), cert. denied, 115 S.Ct. 671 (1994), and Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994), cert. denied, 115 S.Ct. 915 (1995), to show a supposed split in the circuits is misplaced. There is no indication in Blackmon that the State raised a "new rule" defense or that the Fifth Circuit conducted a "new rule" analysis. Both Blackmon and Paradis, moreover, showed circumstances much closer to Gardner, in which the defendant was indeed denied a meaningful opportunity to rebut the evidence against him. In Blackmon, the State concealed some of its witnesses from the defense before trial and interfered with the defense opportunity to interview another witness. 22 F.3d at 563. Blackmon, like Gray, argued that "due to the lack of adequate notice [that evidence of unadjudicated misconduct would be used against him in the penalty phase], the State had a duty under Brady to produce the prior testimonies of [its witnesses]." 22 F.3d at 566, n.21. The Fifth Circuit rejected this argument, ruling that Blackmon had showed "no legal basis" for it. Id. Paradis involved the sentencing judge's consideration of hearsay statements and in camera statements from a declarant whom the defense was not given the opportunity to cross-examine. 20 F.3d at 956.

Gray's case is not a proper vehicle for resolving a supposed "conflict" for other reasons as well. First, as the Fourth Circuit held, "petitioner's contention rings hollow on its facts." 58 F.3d at 66. Gray knew in advance of trial that the prosecution would use Tucker's testimony to implicate Gray in the Sorrell murders, and his advance knowledge of the additional evidence presented to prove that the murders actually occurred was neither necessary nor helpful in his attempt to cross-examine Tucker and impeach Tucker's testimony. Id.

Second, as observed by Judge Hall in his concurring opinion, Gray clearly failed to request that evidence regarding his Sorrell murders claim be taken by the state habeas court, and his claim as presented in district court was thus procedurally barred.

In oral argument on the respondent's motion to dismiss in the Circuit Court of the City of Suffolk, Gray's state habeas counsel expressly characterized this claim as a legal claim for which no evidence was necessary:

> We have here two types of claims in my petition, Your Honor, that are there as one--one sort of claim that I would lump most of these together as legal claims. Claims based on precedent in other courts. These are claims of law for which no evidence is necessary. And I would certainly submit that the Court can rule on the sufficiency and legality of those claims, which are simply matters of law to be argued before the Court here today.

(Resp. App. 4-5).

The first of the claims thus characterized pertained to the use of the testimony of Jeremiah Smallwood. The District Court denied relief on that claim.

The second claim thus characterized, however, was the Sorrell claim for which the District Court granted habeas relief based on evidence proffered for the first time in federal court:

> Now the second most -- again from a reading of the record in this case, the second most electrifying phase of this trial, I would suggest -- and when I say electrifying, I am not using the term lightly -- one that had an impact on those in the courtroom and most certainly had an impact on the jury, is the introduction of the testimony and evidence concerning the Sorrell murders in Chesapeake.

(Resp. App. 6).

Later in his argument, apparently as an afterthought, state habeas counsel suggested that evidence could be taken on this claim to show its effect on the jury, but contrasted this claim from the ineffective assistance of counsel claims which required evidence to establish the claims themselves:

> But those two grounds, [i.e., Smallwood's testimony and the Sorrell evidence] Your Honor, I would suggest are legal claims that certainly require those -- a petition for -- require further evidence not only to establish the fact that they did likely have an effect on the jury. One can never determine the effect on the jury of this evidence because we could not bring the jury in to explain their effect. But we can establish the likelihood of such an effect, and for that reason, Your Honor, I would urge that those claims not be denied.
>
> Finally, Your Honor, there is one group of claims lumped together under ineffective assistance of counsel, which in essence, the essence of it is a legal claim, but it requires evidence to be submitted to the court.

(Resp. App. 7).

The state habeas court denied Gray's Sorrell claim as having been adjudicated on direct appeal. See Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970). In his petition for appeal of the habeas ruling to the Supreme Court of Virginia, Gray urged the Supreme Court to reexamine its ruling on direct appeal rejecting the claim as a matter of law. He argued the merits of the claim as a matter of law, but never contended that the circuit court should have taken evidence

on the claim.

Thus, in state court, the only evidence Gray ever proffered as material to the Sorrell claim was evidence pertaining to its effect on the jurors. Even the rejection of this proffer, however, was waived in state habeas appeal when it was not assigned as error. See Whitley v. Bair, 802 F.2d 1487, 1502 (4th Cir. 1986), cert. denied, 480 U.S. 951 (1987).

Because Gray presented his Sorrell claim in state court as one which required no evidentiary hearing, federal habeas relief premised upon the evidence that was proffered for the first time at the federal evidentiary hearing is barred. Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992); Castille v. Peoples, 489 U.S. 346, 351 (1989). Thus, even if Gray's claim could survive the "new rule" doctrine, it could not survive the procedural default doctrine.

II. GRAY'S CLAIM BASED ON BRADY IS NOT PROPERLY BEFORE THIS COURT, IS PROCEDURALLY BARRED, AND IS WITHOUT MERIT.

The district court ruled that defendant's Brady claim was procedurally defaulted and without merit. Gray never appealed the district court's denial of relief on his Brady claim. He mentioned the issue only in a footnote in his Fourth Circuit brief in support of his contention that Gray's ability to prepare for the cross-examination of Tucker was undermined by the lack of advance notice of the evidence that would be presented. (Resp. App. 1-3). His present claim is thus not properly before this Court.

As the District Court had correctly found, moreover, Gray's Brady claim is procedurally barred and meritless. It is barred because it was never raised at trial, on direct appeal, or in state habeas corpus. The claim would be barred from state habeas relief under Virginia Code

§ 8.01-654(B)(2). Consequently, the claim is barred from federal habeas review as well. See Teague v. Lane, 489 U.S 288 (1989).[1]

The claim is also without merit. All of the "information" which the District Court characterized as "suggest[ing] that Mr. Gray was not involved in the Sorrell murders," was either inadmissible, immaterial, of equal access to Gray and thus not required to be disclosed under Brady, or simply wrongly interpreted by the District Court. None of this information, therefore, could justify habeas corpus relief even if Gray's Brady claim were not procedurally barred. See United States v. Ranney, 719 F.2d 1183, 1190 (1st Cir. 1983) (government not required under Brady to disclose hearsay); United States v. Polowichak, 783 F.2d 410, 414 (4th Cir. 1986) (government not required under Brady to disclose evidence based on pure speculation); United States v. Kennedy, 890 F.2d 1056, 1059 (9th Cir. 1989), cert. denied, 494 U.S. 1008 (1990) (inadmissible information is not Brady material); United States v. Bagley, 473 U.S. 667 (1985) (withheld evidence immaterial under Brady unless it presents a reasonable probability of a different outcome); Stockton v. Murray, 41 F.3d 920, 927, (4th Cir. 1994) ("Brady does not compel the disclosure of evidence available to the defense from other sources, including diligent investigation by the defense"), cert. denied, 116 S.Ct. 37 (1995); United

[1] Indeed, the evidence at the federal evidentiary hearing showed that the so-called exculpatory evidence, consisting of police suspicions about Timothy Sorrell, were widely publicized well before Gray's death sentence became final in the Circuit Court, and thus could have been investigated and presented as the basis of a Brady claim in support of a motion for a new trial and on direct appeal. Nevertheless, trial counsel admitted they did not present these matters in support of a Brady claim in a motion for a new trial. The Brady claim would thus now be barred from state habeas review under Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975), for Gray's failure to present it at trial and on direct appeal, and under Virginia Code § 8.01-654(B)(2) for Gray's failure to present it in state habeas corpus.

States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990) (same holding); Maynard v. Dixon, 943 F.2d 407, 418 (4th Cir. 1991) (hearsay information which does not lead to the discovery of hard, admissible evidence does not constitute Brady material).

III. NO ISSUE WORTHY OF CERTIORARI REVIEW IS PRESENTED BY GRAY'S ATTACK ON VIRGINIA'S "VILENESS" AGGRAVATING FACTOR.

Virginia law provides that a jury may fix a defendant's sentence at death if it finds that his conduct "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Virginia Code § 19.2-264.2(1). "Depravity of mind" is defined as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). An "aggravated battery" is "a battery which, qualitatively and quantatively, is more culpable than the minimum necessary to accomplish an act of murder." Id., 219 Va. at 478, 248 S.E.2d at 149.

As the Fourth Circuit held, the trial court in this case "gave the Smith definitions to the jury essentially verbatim," 58 F.3d at 63, and the statutory formula and limiting definitions have been approved by the Fourth Circuit in numerous previous cases in which this Court has denied certiorari review. See Turner v. Williams, 35 F.3d 872, 891-92 (4th Cir. 1994), cert. denied, 115 S.Ct. 1359 (1994); Jones v. Murray, 976 F.2d 169, 174-75 (4th Cir.), cert. denied, 113 S.Ct. 27 (1992); Jones v. Murray, 947 F.2d 1106, 1117 (4th Cir. 1991), cert. denied, 503 U.S. 973 (1992); Boggs v. Bair, 892 F.2d 1193, 1197 (4th Cir. 1989), cert. denied, 495 U.S. 940 (1990); Turner v. Bass, 753 F.2d 342, 350-53 (4th Cir. 1985), reversed in part on other grounds, 476 U.S. 28 (1986). What was not worthy of certiorari review in any of these prior

cases is no more worthy of such review here. Moreover, for the Court of Appeals or this Court to reach an opposite conclusion on the constitutionality of the same aggravating factor would be the quintessence of a new rule, prohibited by Teague. In addition, Gray's challenge to Virginia's "vileness" aggravating factor does not implicate the constitutionality of his death sentence.

At the guilt stage of a Virginia capital trial, the prosecution must prove not only that the defendant committed a premeditated murder, but also that the murder was committed in one of several enumerated aggravating circumstances. See Va. Code § 18.2-31. In petitioner's case, he was convicted of premeditated murder during the commission of robbery. See Va. Code § 18.2-31(4).

At the penalty phase of a Virginia capital murder trial, moreover, before the defendant even becomes eligible for a death sentence, the prosecution must prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society" and/or that his conduct in committing the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or any aggravated battery to the victim." See Va. Code § 19.2-264.4C. In petitioner's case, the jury found the existence of both "future dangerousness" and "vileness." Even then, however, the jury was free under Virginia law and the court's instructions to impose a life sentence rather than a death sentence.

Aggravating factors are not ends unto themselves; their constitutional function is to narrow the class of those eligible for a death sentence beyond those who commit any murder. Lowenfield v. Phelps, 484 U.S. 231, 244-246 (1988). In Virginia, this limiting function is

accomplished at the guilt stage when the defendant is convicted of a narrow species of capital murder. Thus, when petitioner was convicted of three separate species of premeditated murder, no further narrowing was constitutionally required. See Gregg v. Georgia, 428 U.S. 153, 164 n.9 (1976) (approving constitutionality of state system where aggravator to be proved at penalty stage is that murder was committed during rape). Accordingly, even if petitioner's claim regarding Virginia's "vileness" aggravator had merit -- and clearly it does not -- it would raise only a matter of state law and would not affect the constitutionality of his death sentence. See generally Michigan v. Long, 463 U.S. at 1038 (no jurisdiction to review state law issues on certiorari).

Moreover, Virginia is a "non-weighing" State where aggravating circumstances do not play a decisive role in the jury's determination whether to impose a death sentence. See Swann v. Commonwealth, 247 Va. 222, 236-237, 441 S.E.2d 195, 205, cert. denied, 115 S.Ct. 234 (1994). In Williams' case, in addition to finding "vileness," the jury also found the "future dangerousness" aggravator. (Pet. App. 2a). Thus, even if, hypothetically, Virginia's "vileness" factor were vague, the remaining "future dangerousness" factor would be sufficient to sustain his death sentence. See Stringer v. Black, 112 S.Ct. 1130, 1137 (1992) ("In a non-weighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty."). See also Zant v. Stephens, 462 U.S. 862, 884-891 (1983).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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prepare Gray's defense, 2) Commonwealth's Attorney Ferguson turned over none of the evidence tending to prove that Timothy Sorrell committed these murders, even though the trial court ordered him to disclose his exculpatory evidence[10], 3) at the beginning of the trial, Ferguson made an unequivocal promise to introduce only statements Coleman Gray had made about other crimes he committed, but 4) trial counsel learned only on the eve of the sentencing hearing that Ferguson intended to break his promise and instead present to the jury the testimony of the investigating officer in the Sorrell case, to describe the Sorrell murder scene and display graphic photographs of the victims, and the testimony of the medical examiner to describe the cause of death and the nature and extent of the Sorrells' injuries and to display autopsy photographs.

The Commonwealth's assertion also ignores that, if his defense attorneys possessed the evidence concerning Timothy Sorrell (either in response to their Brady motion or through diligent investigation after adequate notice), they could have challenged the truth of Tucker's

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[10]The Commonwealth attempts to divert the Court's attention by suggesting that the federal district court is engaging in a ruse by using this claim to reach a procedurally defaulted Brady claim. Commonwealth's Brief at 49-51. This is untrue. Although the Court's opinion contains an implicit finding that the prosecutor committed a Brady violation (A. 937, 943), the Court based its decision on the fact that the prosecutor ambushed defense counsel by waiting until the eve of the penalty phase to reveal his plan to conduct a full-blown trial of the Sorrell murders. Given sufficient time to prepare, defense counsel could have uncovered much of the Timothy Sorrell evidence through a diligent investigation, starting with an interview of Detective Slezak.

In any event, Ferguson violated Brady by failing to disclose the Timothy Sorrell evidence. Under Brady v. Maryland, 373 U.S. 83, 87 (1963), he was obligated to turn over this information because it was "favorable to [the] accused .. and material to ... punishment." This Court's holding in Stockton v. Murray, 41 F.3d 920, 927 (4th Cir. 1994) is inapplicable, because Gray's counsel was denied the opportunity to conduct a "diligent investigation." Moreover, the district court erred in holding that Gray's Brady claim was barred from federal review. See Gray Memorandum in Response to Respondent's Motion to Dismiss at 10-12.

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jewelry and tote bags and other personal effects of Mr. Gray that were seized in the search in this particular case. And the purpose of them being introduced in evidence, presumably was to establish that this indeed was jewelry and other items that were stolen by Mr. Gray from the K-Mart where Mr. McClelland worked. And these -- the introduction of these photographs were not objected to by trial counsel and that's -- I wanted to identify those photographs. They are not in the appendix simply because for some reason they apparently -- Well, they did not become part of the appellate record because they were never objected to and there was no ruling ever made at the trial level to make them a pertinent portion of the record for the appeal.

If I might, Your Honor, respond now to Mr. Ferguson's argument.

We have here two types of claims in my petition, Your Honor, that are there as one -- one sort of claim that I would lump most of these together as legal claims. Claims based on precedent in other courts. These are claims of law for which no evidence is necessary. And I would certainly submit that the Court can rule on the sufficiency and the legality of those claims, which are simply

matters of law to be argued before the Court here today.

Of all of those claims -- and Mr. Ferguson has gone through all of them on his motion -- without arguing at length each one, they are all set forth in the petition for habeas corpus and the two motions to amend.

I would point out that two of them, Your Honor, that I certainly would submit are critical to the proper consideration of this habeas corpus petition, the first one is the use of the testimony of Jeramiah Smallwood. To be sure, there is precedent that even if Mr. Smallwood's testimony was perjured, that it could be used. But in this particular case the -- I'd like to comment on the effect of Mr. Smallwood's testimony. The effect that can be gleened from a reading of the record by someone who was not present at the trial of this case, and also another effect.

A reading of the record would indicate -- Well, first I want to point out Mr. Smallwood's testimony was made -- was given, Your Honor, in the guilt phase of the trial. Not in the sentencing phase. Mr. Smallwood testified that he had a conversation with Mr. Gray in prison following all of

murderer. It's the manner in which Smallwood inflamed the jury through his unnecessary testimony.

And Your Honor, that seems to me that this is -- that is one of the most compelling legal reasons to grant a writ of habeas corpus in this particular case. And that there can be evidence adduced at an evidentiary hearing on this petition to establish the effect in the courtroom and the effect, the likely effect on the jury, that Mr. Smallwood's perjured testimony had. And if that were indeed the case, if his perjured testimony had this effect on the jury, or even likely could have had this effect on the jury, then Mr. Gray's -- then the jury's finding of guilt would certainly seem, it seems to me, to be defective.

Now the second most -- again from a reading of the record in this case, the second most electrifying phase of this trial, I would suggest -- and when I say electrifying, I'm not using the term lightly -- one that had an impact on those in the courtroom and most certainly had an impact on the jury, is the introduction of the testimony and the evidence concerning the Sorrell murders in Chesapeake. In essence what the Commonwealth did in order to prove that Gray was -- had future dangerousness and

Sorrell case, the introduction of that evidence, from the Sorrell case in Chesapeake, was just simply -- You know, to say it was unfairly prejudicial to Mr. Gray I would submit is an understatement, and I won't comment beyond that further. But those two grounds, Your Honor, I would suggest are legal claims that certainly require those -- a petition for -- require further evidence not only to establish the fact that they did likely have an effect on the jury. One can never determine the effect on the jury of this evidence because we could not bring the jury in to explain their effect. But we can establish the likelihood of such an effect, and for that reason, Your Honor, I would urge that those claims not be denied.

Finally, Your Honor, there's one group of claims lumped together under ineffective assistance of counsel, which in essence, the essence of it is a legal claim, but it requires evidence to be submitted to the Court. Because not only must we establish that the assistance of counsel that Mr. Gray had at the trial was not reasonably effective, which would require evidence, but we also must establish that but for relationship, that but for the ineffective assistance of counsel, the result at trial would be

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November 22, 1995

The Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Coleman Wayne Gray v. Commonwealth
No. 95-6510

Dear Mr. Suter:

Please find enclosed the original and ten copies of Respondent's Brief in Opposition, to be filed on behalf of the respondent in the above-referenced case.

Thank you for your assistance in this matter.

Very truly yours,

John H. McLees, Jr.
Assistant Attorney General
Criminal Litigation Section

Enclosures

cc: Paul G. Turner, Esquire
Donald R. Lee, Jr., Esquire
Counsel for petitioner

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No. 95-6510

IN THE
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October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

v.

J. D. NETHERLAND, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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CERTIFICATE OF SERVICE

I, John H. McLees, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 22nd day of November, 1995, I mailed, first-class postage pre-paid, an original and eleven (11) copies of the Brief in Opposition to Petition for Writ of Certiorari to the Clerk of this Court and one copy of the same to Paul G. Turner, Assistant Federal Public Defender, P. O. Box 25967, Raleigh, North Carolina 27611-5967, and Donald R. Lee, Esquire, Virginia Capital Representation Resource Center, 1001 East Main Street, Suite 510, Richmond, Virginia 23219-0506, counsel for petitioner.

John H. McLees, Jr.
Assistant Attorney General

REPLY BRIEF

EDITOR'S NOTE

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COLEMAN WAYNE GRAY,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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In Brown v. Allen, 344 U.S. 443 (1953), Justice Black admonished that "it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution." Id. at 554 (dissenting opinion). In this case, the Commonwealth's Attorney obtained a death sentence for Coleman Gray in flagrant defiance of his due process rights, by presenting him to the jury as probably guilty of the Sorrell murders, while withholding evidence tending to show that Gray probably was innocent. Gray's federal claim challenging the action of the Commonwealth's Attorney was properly before the District Court, and it vacated his death sentence.

The Circuit Court was able to reverse the District Court only by ignoring its own prior decisions and the decisions of this Court concerning the scope of the Teague doctrine to hold that Gray impermissibly sought to create a new rule of federal constitutional law. To the contrary, Gray sought only to have general principles of due process of law, long established in this Court, applied to the egregious facts of his case. Contrary to the representations of the Commonwealth, the Circuit Court's application of the Teague doctrine to Gray's claim is anything but routine - it is an unprecedented, unprincipled, result-oriented expansion of the new rule doctrine that is completely at odds with the logic of Teague, its progeny, and the Circuit Court's own prior decisions. This Court should look straight through the meritless procedural arguments made by the Commonwealth and grant its writ of certiorari to prevent Gray's execution in flagrant defiance of the Constitution.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FOURTH CIRCUIT'S OVERREACHING APPLICATION OF THE NEW RULE DOCTRINE TO REINSTATE A DEATH SENTENCE VACATED BY THE DISTRICT COURT BECAUSE THE PROSECUTOR'S TACTICS VIOLATED THE MORAL STANDARDS OF FAIR PLAY EMBODIED IN THE DUE PROCESS CLAUSE AND APPLIED BY THIS COURT IN GARDNER v. FLORIDA

The Commonwealth urges this Court to deny certiorari because the Fourth Circuit's application of the new rule doctrine in this case was merely "routine." Respondent's Brief in Opposition at 10. It is telling, however, that the Commonwealth fails even to attempt to square the Circuit Court's decision with prior decisions of the Fourth Circuit and decisions of this Court holding that a federal court does not create a new rule when it simply applies an existing rule of law designed for the specific purpose of evaluating a variety of factual contexts. Indeed, the Commonwealth ignores that the majority opinion in this case drew a pointed concurrence from a member of the panel criticizing the majority for ignoring the Fourth Circuit's own opinion in Turner v. Williams, 35 F.3d 872 (4th Cir. 1994), cert. denied, 115 S.Ct. 1359 (1995).

In a section of Turner explaining that a federal court cannot be said to apply a new constitutional rule whenever it applies an existing normative rule to a new set of facts, the Fourth Circuit cited with approval a decision of the Ninth Circuit, referring specifically both to its holding that a Jackson v. Virginia challenge is not barred by Teague, and its holding that Teague does not bar application of Gardner's due process principles. 35 F.3d at 885 n.11 (citing Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994), cert. denied, 115 S. Ct. 915 (1995)). The Commonwealth's reluctance to address head-on the issue presented by Gray in his petition for writ of certiorari is understandable - the District Court merely applied the due process principles underlying the Gardner decision, that are designed specifically to evaluate

a myriad of factual contexts, to reach the conclusion that the prosecutor's actions violated Gray's due process rights.

In support of its argument that the Circuit Court's application of the new rule doctrine merely was "routine," the Commonwealth relies chiefly upon this Court's decision in Sawyer v. Smith, 497 U.S. 227 (1990). The Commonwealth represents that in Sawyer "this Court rejected a petitioner's reliance upon Gardner for the general proposition of 'reliability in capital sentencing' as dictating the result later reached in Caldwell v. Mississippi, 472 U.S. 320 (1985), cautioning that 'the [new rule] test would be meaningless if applied at this level of generality.' 497 U.S. at 236. This is a gross over-simplification of this Court's holding in Sawyer.

In Sawyer, the federal district court denied the petitioner's federal habeas corpus petition, which was based in relevant part on the argument that the prosecutor's closing argument during the penalty phase diminished the jury's sense of responsibility for the capital sentencing decision in violation of this Court's 1985 decision in Caldwell. The Court of Appeals affirmed the denial of relief, holding that Caldwell announced a new rule within the meaning of Teague and did not fall within Teague's second exception. 497 U.S. at 232-33.

In reaching its decision, this Court noted that in Caldwell it relied on several prior decisions, including Gardner, for the general Eighth Amendment proposition that capital sentencing must have guarantees of reliability. 497 U.S. at 235. The petitioner in Sawyer relied upon the cases cited by this Court in Caldwell, along with other cases, "in support of the argument that Caldwell was 'rooted' in the Eighth Amendment command of reliable sentencing, and that application of these cases to misleading prosecutorial comment '[b]y

analogy' would lead to the predictable Caldwell result." Id. at 235-36. This Court noted that its earlier Eighth Amendment cases gave only "general support to the conclusion reached in Caldwell." Id. at 236. It is only in this context that this Court stated that "[i]n petitioner's view, Caldwell was dictated by the principle of reliability in capital sentencing. But the test would be meaningless if applied at this level of generality." Id. Contrary to the representations of the Commonwealth, this Court did not hold, or even imply generally, that the new rule test would be meaningless if applied in a way that allows habeas petitioners to rely upon the specific due process principles espoused in Gardner as applied to a new set of facts.

This Court's decision in Gardner did involve, at its most general level, the Eighth Amendment principle that capital sentencing must have guarantees of reliability. Specifically, however, in Gardner this Court held that a capital defendant may not constitutionally be sentenced to death based in part upon evidence which he has had no opportunity to explain or deny, and that he must be given a fair opportunity to challenge the accuracy or materiality of the evidence presented by the prosecution. 430 U.S. 349, 359, 362. It is these specific principles of Fourteenth Amendment due process of law, and not the general Eighth Amendment command of reliable sentencing, that the District Court applied in reaching its decision to vacate Gray's death sentence. These specific principles of due process obviously are intended to apply to a variety of factual settings, and they obviously apply to this case. To hold otherwise would be to hold that Gardner is an anomalous decision, and that the principles of due process applied in Gardner apply only to cases with identical facts. The decisions of this Court and the other federal courts demonstrate that Gardner is not so limited

in its scope, and that these specific principles are intended to be applied by the federal courts in a variety of factual settings. The Circuit Court erred in holding that Gray's claim is barred by the new rule doctrine, and this Court should grant certiorari.

II. GRAY'S CLAIM CONCERNING USE OF THE SORRELL EVIDENCE WAS NOT DEFAULTED IN THE STATE COURTS

The Commonwealth also claims that Gray defaulted in state habeas corpus his claim concerning the use of the Sorrell evidence by the prosecutor. This is untrue. Gray did not default his claim in state court. The Commonwealth's argument is yet another of the illusory procedural screens it attempts to erect to divert this Court's attention from the merits of Gray's claim.

The Commonwealth asserts that the federal district court erred in granting an evidentiary hearing to consider Gray's claim. The essence of its argument is that Gray defaulted his right to a federal evidentiary hearing on his claim by failing to ask for a hearing during the state habeas proceedings. This argument is fatally flawed as a matter of fact and as a matter of law. On the facts, the Commonwealth claims that state habeas counsel represented to the state court that it did not need to take evidence upon the claim. State habeas counsel, however, clearly and expressly stated to the habeas court that he needed an evidentiary hearing on this issue. Indeed, the Commonwealth acknowledges that counsel requested an evidentiary hearing, but it urges this Court to ignore this unequivocal request because it was "apparently [] an afterthought." Respondent's Brief in Opposition at 15. Review of the transcript reveals that it was not an afterthought. Respondent's Appendix 7. Even if it was, however, it nevertheless was a request for an evidentiary hearing, and Gray

was entitled to an evidentiary hearing in the District Court.

The Commonwealth relies upon Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), to argue that the federal district court erred in conducting an evidentiary hearing on this claim if state habeas counsel represented to the state court that it did not need to take evidence upon the claim. Respondent's Brief in Opposition at 16. Assuming for the sake of argument that state habeas counsel made this representation in state court, the Commonwealth still is mistaken. Neither Keeney nor any other case cited by the Commonwealth limits the discretion of a federal district court to hold a hearing upon any federal habeas claim even if one is not required.

In Townsend v. Sain, 372 U.S. 293 (1963), this Court delineated the circumstances in which a habeas petitioner is entitled to an evidentiary hearing as a matter of right. This Court also recognized, however, that a federal district court has discretion to hold a hearing in every case in which a factual dispute exists:

> The purpose of the [Townsend] test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.

Id. at 318 (emphasis added).

Keeney overruled a single aspect of Townsend. If a habeas petitioner has received an evidentiary hearing on his claim in state court, a hearing is now required in federal court only when the petitioner can establish cause for his failure to develop an adequate record

below and prejudice resulting from that failure; it no longer suffices to show merely that he did not deliberately bypass the opportunity to present facts in the state forum.

The rest of Townsend remains the law. In fact, in Keeney Justice O'Connor observed in dissent:

> [T]he district courts ... still possess the discretion, which has not been removed by today's opinion, to hold hearings even where they are not mandatory.

112 S. Ct. at 1727 (citing Townsend, 372 U.S. at 318).

Even if Gray was not entitled to an evidentiary hearing (and he was), the District Court was well within the scope of its authority when it ordered one. The Commonwealth simply has no valid argument supporting its claim that the District Court erred in granting an evidentiary hearing in this case. Rather, the Commonwealth obviously is disappointed that Gray was able to prove his claim in the evidentiary hearing. That hearing was properly ordered by the District Court, and the Circuit Court did not make a finding that Gray defaulted his claim in state court.

The Commonwealth also represents to this Court that Gray defaulted this claim in his petition for appeal to the Virginia Supreme Court because, according to the Commonwealth, Gray only "urged the Supreme Court to re-examine its ruling on direct appeal rejecting the claim as a matter of law." Respondent's Brief in Opposition at 15-16. Again, the Commonwealth is wrong, and it is revealing that it failed to include as part of its appendix for this Court the relevant portions of Gray's Petition for Appeal to the Virginia Supreme Court. In his Petition for Writ of Habeas Corpus, Gray's Sorrell claim was designated as Claim IX. In his Petition for Appeal, Gray appealed to the Virginia Supreme Court the state habeas court's

decision to dismiss this claim. Petitioner's Appendix to Reply Brief at 4-5. In a separate section of the Petition for Appeal, Gray did argue to the Virginia Supreme Court that it should re-examine its ruling on direct appeal, but he argued to the Court that while he was "mindful of [the] court's prior ruling in his own direct appeal[, a] reading of the briefs in that appeal, however, shows a different treatment of the issues involved in this question than is argued here and Gray urges this Court to re-examine its prior ruling accordingly." Petitioner's Appendix to Reply Brief at 9. Gray's counsel necessarily made this argument because the state habeas court had held that this claim was barred from consideration in state habeas because it had been adjudicated on direct appeal. Gray's claim properly was before the District Court, and this Court should grant his petition for writ of certiorari to review the Circuit Court's decision holding that his claim is barred by the new rule doctrine.

III. GRAY'S CLAIM THAT THE PROSECUTOR WITHHELD EXCULPATORY EVIDENCE TENDING TO PROVE THAT ANOTHER SUSPECT COMMITTED THE NOTORIOUS DOUBLE-HOMICIDE UPON WHICH THE STATE RELIED TO PROVE FUTURE DANGEROUSNESS IS PROPERLY BEFORE THIS COURT AND IS NOT PROCEDURALLY BARRED

Although it was not the primary focus of his appeal because the District Court relied primarily upon Gardner in reaching its decision, Gray did argue in the Circuit Court that the Commonwealth's Attorney's actions violated this Court's holding in Brady v. Maryland, 373 U.S. 83, 87 (1963), because he was obligated to turn over the information concerning Timothy Sorrell that was "favorable to [the] accused ... and material to ... punishment." See Appendix to Respondent's Brief in Opposition 3. After this case was briefed in the Fourth Circuit on the merits, but before oral argument, this Court decided Kyles v. Whitley, 115 S. Ct. 1555 (1995). At oral argument, counsel for Gray informed the Circuit Court of the

Kyles opinion, and described its applicability to this case. Gray also relied upon Kyles in his Petition for Rehearing and Suggestion for Rehearing In Banc to the Fourth Circuit. Petitioner's Appendix to Reply Brief at 23-26. Nevertheless, the Fourth Circuit failed to consider whether Gray was entitled to relief under Kyles.

The Commonwealth argues to this Court that it should refuse to consider Gray's Brady/Kyles claim because "[h]e mentioned the issue only in a footnote in his Fourth Circuit brief in support of his contention that Gray's ability to prepare for the cross-examination of Tucker was undermined by the lack of advance notice of the evidence that would be presented. ... His present claim is thus not properly before this Court." Respondent's Brief in Opposition at 16. Again, the Commonwealth is mistaken. Although the District Court did not cite Brady in its opinion, its decision does hold implicitly that the Commonwealth's Attorney withheld exculpatory evidence from Gray. The District Court held that there was substantial undisclosed exculpatory evidence concerning Timothy Sorrell, and it described the testimony of the Commonwealth's Attorney that no such evidence existed as "patently absurd." (A.943). Moreover, the District Court held that Gray was entitled to relief because the Commonwealth had violated his due process rights, and both Brady and Kyles hold that a defendant is entitled to disclosure of exculpatory evidence by operation of the Due Process Clause of the Fourteenth Amendment. The jurisprudence of this Court makes it clear that, while the Court will not consider claims raised for the first time on appeal or certiorari, it will consider new arguments made in support of a properly preserved claim. See Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995).

In Lebron, an artist (Lebron) who created billboards displaying commentary on public

issues filed suit claiming that the National Railroad Passenger Corporation (Amtrak) had violated his First Amendment rights by rejecting a display for an Amtrak billboard because of its political nature. The artist was granted relief in the federal district court, but the United States Court of Appeals for the Second Circuit reversed, holding that Amtrak was not a government entity, and that therefore the Federal Government was not so involved with Amtrak that its decisions could be considered federal action. 115 S. Ct. at 964.

In this Court, Lebron argued that Amtrak was not a private entity, but instead was Government itself. Id. He presented this argument even though "he did not raise this point below; indeed he expressly disavowed it in both the District Court and Court of Appeals." Id. In the lower courts, Lebron argued that Amtrak's actions were subject to constitutional requirements because Amtrak, although a private entity, had close ties to federal entities. It was not until after this Court granted certiorari that Lebron first explicitly presented - in his brief on the merits - the alternative argument that Amtrak was itself a federal entity. Id.

Before reaching the merits of Lebron's claim, this Court first considered whether it properly was before the Court, and held that it was:

> Our traditional rule is that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." Yee v. Escondido, 503 U.S. 519, ___, 112 S. Ct. 1522, 1532, 118 L. Ed.2d 153 (1992); see also Dewey v. Des Moines, 173 U.S. 193, 198, 19 S. Ct. 379, 380, 43 L. Ed. 665 (1899). Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment.

Lebron, 115 S. Ct. at 965.

Here, Gray argued in the District Court and the Circuit Court that the

Commonwealth's Attorney's failure to disclose the exculpatory evidence concerning Timothy Sorrell violated Brady. Indeed, the Circuit Court's opinion implicitly rejects the Brady argument, by refusing even to consider whether Gray was entitled to disclosure of this evidence. See Gray v. Thompson, 58 F.3d 59, 66 n.3 (4th Cir. 1995) ("Petitioner devotes extensive portions of his brief to Timothy Sorrell's status as an initial suspect in the Sorrell murders, arguing that had he known of that fact he could have better defused the charge leveled against him. We refuse to be dragged into a mini-trial on the respective strengths of the case against Sorrell and the petitioner. Our sole commission on collateral review is to review the state trial record for violations of federal law"). Gray's claim concerning the Sorrell murders properly was before the District Court; he consistently pressed in the courts below his argument that his due process rights under Brady also were violated, and he is entitled to press that argument in this Court.

The Commonwealth also argues that Gray's Brady/Kyles claim is without merit. The Commonwealth, however, fails even to take issue with the fact that there was substantial evidence tending to prove that Timothy Sorrell killed his wife and his daughter, none of which was disclosed to Gray. Instead, the Commonwealth merely attempts to hide behind the bald, unsupported statement that "[a]ll of the 'information' which the District Court characterized as 'suggest[ing] that Mr. Gray was not involved in the Sorrell murders' was either inadmissible, immaterial, of equal access to Gray and thus not required to be disclosed under Brady, or simply wrongly interpreted by the District Court. None of this information, therefore, could justify habeas corpus relief even if Gray's Brady claim were not procedurally barred." Respondent's Brief in Opposition at 17. This Court's decision in Kyles

demonstrates that the Commonwealth's contention plainly is wrong.

As is explained in the Petition for Writ of Certiorari, Gray's counsel could have thoroughly dismantled the Commonwealth's Sorrell case if the Commonwealth's Attorney had disclosed to them the evidence concerning Timothy Sorrell. For example, the lead detective's knowledge of the evidence concerning Timothy Sorrell would have fueled a withering cross-examination, destroying the jury's confidence in accomplice Tucker's story that Gray confessed to the crimes and raising a substantial implication that the prosecutor had coached the detective to avoid discussion of Timothy Sorrell. See Kyles, 115 S. Ct. at 1570. This cross-examination also would have demonstrated that the detective either was being less than wholly candid or that he was less than fully informed, that the investigation of the Sorrell murders was limited by the prosecution's blind acceptance of Tucker's story, and that the prosecution, police, and Tucker set up Gray. See id. at 1573, 1575. It also would have shown that Gray had an alibi known to the detective. The exculpatory evidence withheld by the prosecutor undoubtedly was material, and the Fourth Circuit should have affirmed the District Court's grant of the writ of habeas corpus, even based on Brady and Kyles alone. This Court should grant certiorari to review the Fourth Circuit's decision.

CONCLUSION

As we near the twenty-first century, it should be a truism that a man on trial for his life has a constitutional right to prepare a meaningful defense to the state's case for death. Through the Due Process Clause of the Fourteenth Amendment, our federal district courts largely have condemned the archaic practice of "trial by ambush," especially in capital cases. According to the Commonwealth of Virginia, however, Coleman Wayne Gray had no right at

all to defend himself against the charge that he was responsible for one of the most notorious double-homicides in the history of Tidewater, Virginia. The paramount duty of the Suffolk Commonwealth's Attorney was not to obtain a death sentence in this case - it was to ensure that Coleman Gray received a fair trial. Instead, he ambushed Gray and his lawyers. First he broke a promise to introduce only "statements" that Gray allegedly made concerning unadjudicated crimes, including the Sorrell murders. Then, he presented the gruesome Sorrell murder evidence to the jury, even though there was substantial evidence tending to prove that someone else had committed the crime, and almost no evidence linking Gray. Gray probably was innocent of these crimes, but the Commonwealth's Attorney presented him to the jury as probably guilty. It is an understatement to say that this is not due process of law.

The Commonwealth maintains to this day that it acted fairly in this case, honoring Gray's constitutional right to due process of law. The District Court decided, however, that the Commonwealth's "tactics violated the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution." The Circuit Court side-stepped the merits of this holding, by fashioning an overbroad, overreaching formulation of this Court's new rule doctrine to hold that the District Court impermissibly created a new rule of federal constitutional law. This decision, if allowed to stand, will encourage the federal courts to refuse to reach the merits of most constitutional claims raised by federal habeas petitioners, and instead to defer at all costs to state court decisions. This is not the intent of the new rule doctrine and this Court should grant certiorari to review the Fourth Circuit's decision.

Respectfully submitted,

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PETITIONER'S APPENDIX TO REPLY BRIEF

IN THE
SUPREME COURT OF VIRGINIA

COLEMAN WAYNE GRAY,

Appellant

v.

CHARLES E. THOMPSON, Warden

Appellee

PETITION FOR APPEAL

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1491(1982), treated the same issue, but in the context of a retrial, rather than habeas corpus and thus is not in point.

Moreover, the trial judge did not make any affirmative statement of his ability to try the case free of bias or prejudice. (Tr. at 6). The trial judge thus abused his discretion in denying Gray's Motion. Justus, supra, 222 Va. at _____, 283 S.E. 2d at 908.

II. The Trial Court Erred in Dismissing Gray's Claims I, II, V, VI, IX, XI, XII, XVI and XIX as Being Procedurally Barred by Prior Adjudication at Trial and on Direct Appeal

A. Gray is mindful of the rules of Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243(1969), and Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680(1974), cert. den. 419 U.S. 1108, 95 S.Ct. 780(1975).

B. See Argument VIII hereinbelow, specifically pertaining to Gray's Claim IX.

C. With respect to Gray's Claim XII, Gray's death sentence is jurisdictionally faulty and thus subject to habeas corpus review because the Trial Court's sentencing order was defective. The written sentencing order entered by the Trial Court on February 3, 1986, did not make any finding of either vileness or future dangerousness.

The Trial Court apparently relied on findings of "vileness" and "future dangerousness" when it orally

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imposed Gray's death sentence on January 27, 1986, although it did not specifically say as much. (J.A. at 1604-1605). In its written order entered on February 3, 1986, formalizing the sentence, however, the Trial Court apparently abandoned any finding of vileness. In fact, the written order of sentencing failed to base the sentence on any finding of either vileness or future dangerousness. Therefore, there is no basis in the Trial Court's written order upon which to determine what, if any, predicates the Trial Court used in determining the sentence. Thus the sentencing order entered by the Trial Court on February 3, 1986, was on its face inconsistent with the "responsible and reliable exercise of sentencing discretion" required in death penalty cases. Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639(1985).

III. The Trial Court Erred in Dismissing Gray's Claims III, IV, VIII, X, XII, XIV, XVII and XX as Procedurally Barred Because the Claims Could Have Been Raised at Trial and on Appeal, But Were Not.

A. Gray is again mindful of the rules of Brooks v. Peyton, supra, and Slayton v. Parrigan, supra.

B. With respect to Gray's Claim VIII, Gray's death sentence is jurisdictionally faulty because the Trial

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simply prejudged the issues, without hearing any evidence in the form of competent expert testimony, and thereby was in error in denying Gray a plenary hearing.

VII. The Trial Court Erred in Dismissing Gray's Claim XVIII as Meritless, as a Matter of Law.

Counsel declines to elaborate on this question, except to respectfully urge this Court, when engaging in proportionality review, to also compare death sentences in cases under review with life sentences imposed on other capital defendants and with sentences imposed upon noncapital homicide defendants, in light of the facts and circumstances in each case in order to fully insure that capital punishment is meted out only after a truly full proportionability review.

VIII. This Court Should Reexamine Ruling in Gray v. Commonwealth, 223 Va. 313, 356 S.E.2d 157 (1987), at It Relates to Gray's Claim IX and the Sorrell Murders.

Gregg v. Georgia, 425 U.S. 153, 96 S.Ct. 2909(1976), wherein the Supreme Court held it to be "desirable for the jury to have as much information before it as possible when it makes the sentencing decision, "428 U.S. at 204, 96 S.Ct. at 2939, did not go so far as to allow the kind of evidence such as the Sorrell murders which the Commonwealth introduced in this case.

In deciding this issue on Gray's direct appeal, Gray v. Commonwealth, supra, this Court relied upon Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422(1985), Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808(1979), cert. den. 445 U.S. 972, 100 S.Ct. 1666(1980), and Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643(1982), cert. den. 460 U.S. 1029, 103 S.Ct. 1280(1983), for support of the use of evidence of other crimes in the penalty phase. Watkins, however, is inapposite, in that Watkins was already charged and indicted for the other offenses referred to. Other cases cited in Watkins involved uncharged crimes which the defendant had admitted committing, or which involved direct evidence that the crimes were committed by the defendant. See Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815(1985), cert. den. 474 U.S. 865, 106 S.Ct. 189(1985), where Poyner himself confessed to other crimes; Stamper, supra, where the victim of another crime by Stamper testified; and Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371(1984), cert. den. 469 U.S. 873, 105 S.Ct. 229(1984), involving eyewitness testimony of another murder.

Only Quintana, supra, stands for the use of evidence of other uncharged crimes to which the defendant had not admitted and which did not involve direct

evidence. In Quintana, witnesses testified as to admissions by the defendant of uncharged crimes in other jurisdictions. These witnesses were not, however, co-defendants of Quintana testifying under plea agreement, as was Tucker in the present case.

In this case, the only direct evidence linking Gray to the Sorrell murders was that of Melvin Tucker, a convicted felon and a co-defendant testifying under a promise of leniency -- testimony which should be considered inherently unreliable. The use of this kind of evidence simply goes beyond the pale established by the existing case law, and in itself was fundamentally unfair and prejudicial to Gray.

The Commonwealth did not disclose its intention to use the Sorrell murders as evidence until such a late date that it was impossible for Gray's defense counsel to reasonably prepare for its use. Gray was literally tried and convicted in Suffolk of an uncharged and unproven offense which occurred in Chesapeake, by the use of what amounts to no reasonable standard of proof. The evidence was entirely circumstantial except for the testimony of Gray's co-defendant Tucker, who testified pursuant to a plea bargain. The only fair defense for Gray to such testimony would be either the requirement of proof beyond a reasonable doubt or innocence to be proved. The first

was not achieved and the second would be impossible anyway, and in fact no amount of preparation time on the part of defense counsel would have been adequate. This is where another fundamental violation of Gray's right to due process occurred.

Gray is mindful of this Court's prior ruling in his own direct appeal. Gray, supra. A reading of the briefs in that appeal, however, shows a different treatment of the issues involved in this question than is argued here and Gray urges this Court to reexamine its prior ruling accordingly.

CONCLUSION

For the reasons shown, the Trial Court committed reversible error in entering the order dated May 14, 1990, dismissing Gray's Petition for Habeas Corpus, and Gray prays that he be awarded an appeal to this Court.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASE NO. 94-4009
CASE NO. 94-4011

COLEMAN WAYNE GRAY

Petitioner-Appellee,

v.

CHARLES E. THOMPSON, WARDEN,

Respondent-Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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STATEMENT OF PURPOSE

In this death penalty case, the district court held that the Commonwealth had secured Coleman Wayne Gray's death sentence using "tactics violat[ing] the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution." On June 28, 1995, a panel of this Court reversed on the ground that this claim is barred by the "new rule doctrine" first announced in Teague v. Lane, 489 U.S. 288 (1989). The panel's opinion conflicts with prior decisions of the Court concerning the "new rule doctrine."

The panel also overlooked a material fact. The crux of Gray's claim is that the Commonwealth unfairly ambushed him by giving insufficient notice that, at the penalty phase of his capital murder trial, Gray would be tried for an unrelated grisly double homicide, and that the Commonwealth failed to disclose that it possessed evidence tending to prove that another individual, Timothy Sorrell, had committed these murders. The panel's opinion considers this fact only in passing, describing Sorrell as merely "an initial suspect," even though Gray demonstrated at a federal evidentiary hearing that Sorrell was a suspect right up until the time of Gray's trial. Because it ignored this material fact, the panel also failed to determine whether the Commonwealth had an independent duty to disclose this evidence because it was exculpatory in nature.

Gray also makes a suggestion for rehearing in banc because consideration by the full court is necessary to secure uniformity of its decisions concerning the new rule doctrine. Moreover, this proceeding involves a question of exceptional importance because it concerns whether states within the Fourth Circuit may present evidence of prior unadjudicated conduct at the penalty phase of capital murder trials without any regard whatsoever for the reliability of the evidence, and without any concern for whether defense counsel has been given a reasonable opportunity to challenge the evidence.

STATEMENT OF FACTS

Richard McClelland, the manager of a Murphy's Mart store in Portsmouth, Virginia, was abducted from his car after leaving work, robbed, and shot to death in Suffolk, Virginia. Melvin Tucker and Coleman Gray were charged with this offense. Judge Godwin, the Suffolk Senior Circuit Court Judge, appointed James Moore and Ward Eason in May, 1985, to represent Gray.

Trial counsel twice moved the court either to pay for or to appoint an investigator to help them fully and adequately prepare Gray's defense. (A. 798-800, 1063-68). Those motions were denied. Id. Trial counsel also moved for disclosure of all exculpatory evidence. (A. 790-92). Pursuant to the order granting this motion, Commonwealth's Attorney Philip Ferguson met with Gray's counsel in the police station and allowed them to examine all of the physical evidence collected concerning the McClelland murder. (A. 937). Ferguson produced no exculpatory evidence related to the penalty phase of Gray's trial.

Under Virginia law, only the triggerman may be convicted of capital murder and sentenced to death. Va. Code §18.2-18. Consequently, the most critical factual issue in the McClelland murder trial probably was the identity of the triggerman. There was no physical evidence to prove whether Tucker or Gray shot and killed McClelland, and each man claimed that the other had committed the murder. (A. 937). Before Gray's trial, however, the Commonwealth's Attorney entered into a plea bargain with Tucker. In exchange for Tucker's testimony against Gray for capital murder, the Commonwealth agreed to prosecute Tucker only for first degree murder. (A. 937-38).

Gray's trial began on December 2, 1985. Besides the testimony of Tucker, the Commonwealth offered only the testimony of three jailhouse snitches to prove that Gray was the triggerman. On December 5, 1985, Gray's jury retired to deliberate, after receiving all of the evidence concerning the McClelland murder, and after being instructed by the trial judge. That same

day, the jury returned verdicts of guilty against Gray on all counts. (A. 940).

At the beginning of the trial, one of Gray's attorneys asked the court to order the Commonwealth's Attorney to reveal the evidence he would introduce at the penalty phase if Gray was found guilty. Ferguson represented to the court and to defense counsel that he intended to introduce evidence of statements Gray allegedly had made about other crimes he had committed, including the murders of Lisa and Shanta Sorrell. When pressed by defense counsel concerning whether he planned to present "evidence or just his statement," Ferguson pledged to introduce only "[s]tatements made by your client that he did these things." (A. 938-39). Ferguson did not disclose the context of the statements or to whom Gray allegedly had made these statements.

The Sorrell murders were one of the most highly publicized crimes in the history of the Tidewater, Virginia, area. In December, 1984, Lisa Sorrell and her three-year-old daughter Shanta were abducted from Greenbriar Mall in Chesapeake, Virginia. Their abandoned bodies were found five days later, after an intensive, well-publicized search. Lisa Sorrell was slumped in the passenger seat of her partially burned automobile. She had been shot in the head six times by a .32 caliber gun. Shanta's body was found in the trunk of her mother's car. She apparently had died of carbon monoxide inhalation. (A. 939-40).

On the morning after the jury returned its conviction, the penalty phase of Gray's capital murder trial began. Before the penalty trial began, the attorneys met in the judge's chambers. Gray's counsel told the court that the previous evening, Ferguson had disclosed for the first time that he intended to introduce not only statements Gray allegedly had made about the Sorrell murders, but also substantial testimony and graphic evidence about the crimes. Despite Ferguson's previous unequivocal pledge to introduce only Gray's alleged statements, Ferguson had arranged to present the following additional evidence at the penalty phase: 1) testimony of Detective Slezak, the police

officer who investigated the Sorrell murders;[1] 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims; and 3) testimony of the medical examiner who investigated the cause of death and the nature and extent of the Sorrells' injuries. (A. 940-41).

Gray's trial counsel repeatedly told the court that they were not prepared to defend their client for the Sorrell murders, aside from their ability to rebut the statements allegedly made by Gray to fellow inmates. Despite counsel's plea for additional time to prepare, the trial court permitted Ferguson to introduce extensive evidence about the Sorrell murders. (A. 2063-68). First, the Commonwealth again called Gray's accomplice Melvin Tucker to testify. Tucker testified that in May, 1985, while he and Gray were looking for newspaper articles about the McClelland murder, Gray pointed to an article with a picture of the Sorrells and admitted that he had "knocked off" Lisa Sorrell.[2] (A. 941).

Based solely upon Tucker's testimony, the trial court allowed Commonwealth's Attorney Ferguson to introduce all of the evidence gathered by the Chesapeake Police Department regarding the Sorrell murders. First, the Commonwealth called Detective Michael Slezak, the Chesapeake police officer who investigated the Sorrell murders. The ostensible purpose of Slezak's testimony was to demonstrate that the Sorrell murders actually had occurred, and he did this by identifying various graphic photographs of the burned automobile and the murder victims. These photographs were admitted into evidence. (A. 941). Next, Dr. Faruk Presswalla, the state medical examiner

[1]It is clear that the prosecutor lied when he promised to introduce statements only. Slezak testified at the federal evidentiary hearing that he knew for an appreciable length of time, perhaps a month or more, that he would be called to testify in the Gray murder trial. (A. 940).

[2]The Sorrell murders occurred nearly six months before the McClelland murder. No such newspaper article, from the time of the McClelland crime, with pictures of the Sorrells, has ever been introduced into evidence. (A. 941).

who performed the Sorrell autopsies, testified concerning the victims' causes of death. Presswalla displayed the autopsy photos of Lisa and Shanta Sorrell to the jury, and he described the violent causes of their deaths. (A. 2136-44).

As they had predicted to the trial court, Gray's trial attorneys were unable to effectively cross-examine these witnesses. Trial counsel were prepared only to challenge the evidence Ferguson indicated he would introduce at the outset of the trial: Melvin Tucker's statement that Gray allegedly had confessed to the Sorrell murders. (A. 944).

After the Commonwealth rested, Gray took the stand and admitted that he had played a part in the McClelland murder. Nevertheless, Gray denied being the triggerman, and he blamed the killing on Tucker. He also flatly denied any involvement in the Sorrell murders. (A. 944).

During penalty phase closing arguments, Ferguson used the Sorrell evidence extensively in his efforts to convince the jury to sentence Gray to death as a future danger to society. Ferguson described Shanta Sorrell's horrible death to the jury, he charged Gray with committing "murder after murder," supporting this statement with the Sorrell killings and a California crime for which Gray had been acquitted, and he accused Gray of "sit[ting] in judgment of Lisa and Shanta Sorrell without charges, without trial, without due process, without anything, other than a gun." (A. 2243-45, 2250-52, 2263). After deliberating for one hour and ten minutes, the jury unanimously fixed Gray's punishment at death. The jury found both that Gray posed a future danger to society and that his conduct in committing the offense was vile "in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." (A. 2265-68).

Following state post-conviction proceedings, the federal district court convened an evidentiary hearing on Gray's federal habeas corpus petition. In this petition, Gray claimed that the

Commonwealth's use of the Sorrell evidence violated his due process rights. The stated purpose of the evidentiary hearing was to determine whether Gray's attorneys were given ample notice of the evidence to be presented against him concerning the Sorrell murders, whether he was given a fair opportunity for cross-examination concerning the Sorrell murder issues, and whether the prosecution failed to turn over exculpatory information tending to prove that another person killed Lisa and Shanta Sorrell. (A. 265).

During the hearing, Gray proved that if his defense attorneys had possessed the evidence concerning Timothy Sorrell (either in response to their Brady motion or through diligent investigation after adequate notice), they could have challenged the truth of Tucker's testimony through effective cross-examination of Detective Slezak. Specifically, defense counsel could have made at least the following points during Slezak's testimony: 1) Timothy Sorrell, the victim's husband, was the primary and only suspect in the case for a substantial period of time. 2) The police designated Timothy Sorrell as their sole suspect on the evidence they sent to labs to be analyzed. 3) Timothy Sorrell admitted being at the Greenbriar Mall on the evening of the murders. 4) When Timothy Sorrell ran into his wife's parents at the mall that evening, he ignored them. 5) Timothy Sorrell made suspicious comments after he was notified by the police that his wife and child had been found. 6) Timothy Sorrell changed his alibi throughout the murder investigation. 7) Timothy Sorrell had a strong motive to commit these murders--just two weeks prior to the brutal slayings, he became the beneficiary of an insurance policy written on his wife's life. 8) Six days before Coleman Gray's trial, Lisa Sorrell's parents filed a lawsuit seeking to prohibit Timothy Sorrell from collecting the proceeds of the life insurance policy. 9) Timothy Sorrell visited a friend on the night his wife and child disappeared. That evening, five days before their bodies were found, Sorrell allegedly told his friends that his wife and baby were dead. 10) Contrary to Detective Slezak's speculation, Coleman

Gray did not have sufficient time to commit the Sorrell murders during his wife's dinner break. 11) Even when Slezak lied to Coleman Gray and told him that his fingerprint had been found at the Sorrell murder scene, Gray steadfastly maintained his innocence. 12) Slezak had consulted with the Chesapeake Commonwealth's Attorney to determine whether it was appropriate to prosecute Timothy Sorrell.

This list is derived from the federal district court's findings of fact. To date, no one ever has been charged with or tried for the Sorrell murders.

ARGUMENT

I. THIS COURT'S PRIOR DECISIONS DEMONSTRATE THAT GRAY DOES NOT SEEK TO CREATE A NEW RULE, BUT INSTEAD MERELY SEEKS TO APPLY FUNDAMENTAL, PRE-EXISTING PRINCIPLES OF DUE PROCESS TO THE FACTS OF HIS CASE

In its memorandum opinion granting relief, the district court concluded that Gray's right to due process was violated by the manner in which the Commonwealth presented evidence of the Sorrell murders to the jury. The court relied chiefly upon two intersecting principles of due process articulated in Gardner v. Florida, 430 U.S. 349 (1977). First, a capital defendant may not constitutionally be sentenced to death based in part upon evidence which he has had no opportunity to explain or deny. Id. at 362. Second, counsel for a capital defendant must be given a fair opportunity to challenge the accuracy or materiality of the evidence presented by the prosecution. Id. at 356. Without these safeguards, a state creates the risk that a person will be sentenced to death based on constitutionally unreliable evidence. Id. at 359. The Gardner court made clear that these principles of due process apply to a wide range of circumstances. While a defendant in the penalty phase of a capital murder trial may have no right to object to a particular result of the sentencing process, he does have a legitimate interest in the character of the procedure which leads to the imposition of his sentence. Id. at 358. Thus, the due process principles established in Gardner are

meant to apply not only to cases that are similar factually, but to a variety of situations involving the character of the penalty phase procedure used by a state to obtain a death sentence.

In this case, Commonwealth's Attorney Ferguson presented Coleman Gray as probably guilty of the Sorrell murders when in fact he probably is innocent. First, Ferguson lied to defense counsel and promised only to introduce statements made by Gray to others about the Sorrell murders, even though Ferguson knew he intended to present much more. Ferguson then conducted a full-blown prosecution of the Sorrell matter, including graphic testimony and gruesome photographs from the Sorrell crime scene and autopsies. He also withheld from defense counsel exculpatory evidence that Timothy Sorrell, the husband and father of the victims, may have committed the murders. Under these circumstances, the district court concluded that trial counsel was not given a fair opportunity to challenge the accuracy and materiality of the evidence presented by the prosecution, and that Gray had been sentenced to death based in part upon evidence which he had been given no opportunity to explain or deny.

A panel of this Court, however, held that the district court failed to conduct "new rule" analysis. According to the panel decision, "the precise rule petitioner seeks is a constitutional entitlement to adequate advance notice of particular items of evidence." Slip op. at 8 (emphasis in original). The panel concluded that this specific rule (which was neither advanced by Gray nor established by the district court) is not dictated by Gardner. The panel's decision is in direct conflict with at least two other opinions from this Court.

In Turner v. Williams, 35 F.3d 872 (4th Cir. 1994), this Court explained that, for purposes of new rule analysis, the rule sought by the petitioner rarely is defined properly as "the most specific conclusion or holding [the petitioner] hopes we reach." Id. at 883 (emphasis in original). This is so especially when a case provides a standard that necessarily will be applied to widely varying fact

patterns. For example:

> Obviously, a federal habeas court cannot be said to apply a "new constitutional rule" whenever it applies the Jackson v. Virginia test to a "new" set of facts in evidence.

35 F.3d at 885 (quoting West v. Wright, 931 F.2d 262, 266. (4th Cir. 1991), rev'd on other grounds, 112 S. Ct. 2482 (1992)). Indeed, the Turner decision also cites with approval the Ninth Circuit's holding in Paradis v. Arave, 20 F.3d 950, 953-54 (9th Cir. 1994), that the new rule doctrine does not bar application of Gardner's due process principles to a new set of facts. 35 F.3d at 885 n.11.

The Turner court summarized its holding as follows:

> [W]hen we apply an extant normative rule to a new set of facts (leaving intact the extant rule) generally we do not announce a new constitutional rule of criminal procedure for purposes of Teague. ... [W]hen a rule provides a standard that of necessity requires a case-by-case examination, generally the results yielded by that application are not "new rules" because those results do not "break[ ] new ground or impose[ ] a new obligation on the States or the Federal Government."

Id. at 885-6 (quoting Teague, 489 U.S. at 301).

In Ostrander v. Green, 46 F.3d 347, 354 (4th Cir. 1995), this Court warned about the dangers of framing "rules" too narrowly when conducting new rule analysis. The Green opinion recognized that, if courts choose to characterize the "rule" as the most specific conclusion or holding ostensibly sought by a petitioner, states then can erect a Teague bar in almost every case. Id. The upshot of this effectively would be to abolish federal habeas review, which certainly is not the intent of Teague and its progeny. See Wright v. West, 112 S. Ct. 2482, 2497 (1992) (O'Connor, J., concurring in the judgment) ("In Teague, we refused to give state prisoners the retroactive benefit of rules of law, but we did not create any deferential standard of review with regard to old rules."). Justice O'Connor is the author of the Teague opinion.

Other decisions of the United States Supreme Court demonstrate that the application of

Gardner's principles to new sets of facts typically do not create new rules. For example, in Simmons v. South Carolina, 114 S. Ct. 2187 (1994), the Court held that when a state seeks the death penalty based on future dangerousness, the defendant cannot be denied the right to inform the jury that he would be ineligible for parole if sentenced to life imprisonment. The Court explained that its decision was compelled by Gardner's holding that a state may not send a man to his death "on the basis of information which he had no opportunity to deny or explain." Id. at 2194. And, in Crane v. Kentucky, 106 S. Ct. 2142 (1986), a unanimous Court held that a state may not exclude testimony about the circumstances of a defendant's confession on the ground that the testimony pertains solely to an issue of voluntariness resolved against him in a pre-trial ruling. The Court noted that:

> We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence ... when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing."

Id. at 2146-47 (emphasis added and citations omitted).

Here, Gray did not seek the narrow rule described by the panel in its decision, that he was constitutionally entitled to adequate advance notice of particular items of evidence.[3] Nor did the

[3]In its opinion, the panel suggests that the United States Supreme Court's holding in Williams v. New York, 337 U.S. 241 (1949), may have dictated dismissal of Gray's claim on the merits. The panel's decision ignores that Gardner implicitly overruled the holding in Williams as it may have related to capital cases, both because the Williams case was decided in 1949, when no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by the Court, and because it was decided before it was "clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 357-58.

The Court's implicit overruling of Williams for capital cases also casts doubt on the panel's decision to rely on a non-capital case, Weatherford v. Bursey, 429 U.S. 445 (1977), and its progeny as other precedent dictating a decision on the merits against Gray. The cases cited by the panel are not death penalty cases applying due process principles to the unique capital sentencing process. Moreover, even these rulings recognize exceptions to their holdings for factors present in this case.

district court impose this obligation upon the Commonwealth of Virginia. The district court simply applied the principles set forth in Gardner to hold that the Commonwealth's Attorney's "tactics violated the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution." The district court's decision stands for the unremarkable proposition that, when the Commonwealth chooses to introduce evidence of prior unadjudicated conduct in seeking a death sentence, its behavior must comport with basic principles of due process, including those described in Gardner. This is all that Gray asked for, and it is all that the district court did.

As Judge Hall noted in his opinion concurring in the panel's decision, the majority's opinion, insofar as it is contrary to Turner and Ostrander, will present difficulties for the district courts in the Fourth Circuit. The panel's decision simply cannot be squared with the framework for "new rule" analysis painstakingly distilled from the United States Supreme Court's precedents by the Turner panel. Consequently, the Court should grant Gray's petition for rehearing and his suggestion for rehearing in banc, to address this conflict and to secure uniformity of this Court's decisions concerning the new rule doctrine.

II. THE COURT'S OPINION OVERLOOKS THE FACT THAT TIMOTHY SORRELL WAS NOT MERELY AN "INITIAL SUSPECT," THAT THE COMMONWEALTH POSSESSED MORE EVIDENCE TENDING TO PROVE THAT SORRELL COMMITTED THE MURDERS THAN THAT GRAY DID, AND THAT THE FAILURE TO DISCLOSE HIS IDENTITY TO COUNSEL VIOLATED BRADY

Recently, the United States Supreme Court explained in Kyles v. Whitley, 115 S. Ct. 1555, 1566 (1995), that one proves a Brady violation by "showing that the favorable [withheld] evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence

See, e.g., Weatherford, 429 U.S. at 559-60 (concealment of exculpatory evidence and deliberate misrepresentation); United States v. Kendall, 766 F.2d 1426, 1441 (10th Cir. 1985) (unfair surprise).

in the verdict." Here, the Commonwealth possessed abundant evidence tending to prove that Timothy Sorrell murdered his wife and child. Nevertheless, the panel's decision pays scant attention to this evidence, noting only that Sorrell was an "initial suspect" in the murders, "although upon further investigation he was not charged." Slip op. at 6 and 12 n.3. The facts presented to the district court demonstrate that Sorrell was much more than a mere initial suspect. Indeed, there was enough evidence against Sorrell to prompt Detective Slezak, the lead investigator, to consult the Chesapeake Commonwealth's Attorney and ask him to determine whether it was appropriate to prosecute Timothy Sorrell. (A. 943).

Under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Bagley, 473 U.S. 667 (1985), Gray had the right to discover any exculpatory evidence held by the Commonwealth relating either to guilt or to punishment. Gray was entitled to the Sorrell evidence withheld by the Commonwealth, especially after making a specific request for exculpatory evidence, because it was "favorable to [the] accused ... and material to ... punishment." Brady, 373 U.S. at 87. It could not have been more material -- it tended to prove that Gray did not commit the Sorrell murders, even though the Commonwealth sought to portray him as guilty of those crimes.

The panel's faulty "new rule" analysis is driven in part by its failure to recognize that Sorrell was a serious suspect, and that Gray was entitled to exculpatory evidence related to Sorrell, or at a minimum to sufficient time to develop that evidence and use it at the penalty phase. In large part because it read Timothy Sorrell out of the equation, the panel was able to distill the "rule" sought by Gray as an entitlement to adequate advance notice of particular items of evidence, even though Gray never requested such a rule. It also allowed the panel to hold that Gardner's general rule forbidding a capital defendant to be sentenced "on the basis of information that he had no opportunity to explain or deny" was inapplicable simply because Gray's attorneys were given an opportunity to cross-

examine Melvin Tucker, Detective Slezak, and the medical examiner.

The opportunity to cross-examine has never been a constitutionally adequate substitute for access to exculpatory information when the defendant has no reason to know that the exculpatory information exists. See, e.g., Love v. Johnson, No 92-7080, 1995 WL 369609, (4th Cir. June 22, 1995) (describing more lenient standard for Brady requests when defendant has no reason to know whether exculpatory information exists). Defense counsel, who reasonably relied on the prosecutor's promise that evidence of the Sorrell murders would be limited to Gray's alleged statements to others, had no reason to expect more than a credibility contest regarding these statements.

Even if the prosecutor's disclosure that he would introduce the subject of the Sorrell murders should have put defense counsel on notice that everything relating to that murder was fair game, and even if the exculpatory information known to the Commonwealth all could have been discovered by defense counsel -- dubious propositions at best -- defense counsel could not possibly investigate and develop this information in the three days between disclosure and the start of the penalty trial, while defending Gray for the capital murder of McClelland. As soon as the prosecutor dropped his "time bomb" at the start of the penalty trial, defense counsel promptly and repeatedly informed the court that they needed more time. The district court made an express factual finding that counsel made a satisfactory request for a continuance. The panel, in contravention of Anderson v. City of Bessemer City, 470 U.S. 564 (1985), ignored this factual finding and concluded not only that Gray received adequate notice to discover the exculpatory evidence, but also that Gray's counsel did not ask for additional time.

Because of the prosecutor's unethical and unconstitutional conduct, defense counsel was denied a meaningful opportunity to rebut the evidence and innuendo that Gray was involved in the Sorrell killings. The Commonwealth chose to play unfairly, to ambush Gray by lying about what it

intended to produce at the penalty phase and by failing to disclose evidence tending to prove that Gray did not commit these crimes. Because the panel ignored the substantial evidence withheld by the prosecutor, however, it also failed to recognize that Gray was denied the opportunity to present a defense that would have "put the whole case in [ ] a different light." Kyles, 115 S. Ct. at 1566.

CONCLUSION

One of the most difficult challenges presently facing federal habeas courts is application of the sometimes perplexing new rule doctrine. In Turner, the Fourth Circuit gave the district courts a practical roadmap for new rule analysis, distilled from the United States Supreme Court's precedents. The panel's decision here conflicts with the Turner analysis, leaving the district courts without direction. Rehearing should be granted to resolve this conflict, and to give consideration to the Sorrell evidence withheld by the prosecutor. Rehearing in banc should be granted to secure uniformity of the court's new rule decisions.

Rehearing in banc also is appropriate because the issue presented is one of exceptional importance, concerning whether states may present evidence of prior unadjudicated conduct at the penalty phase of capital murder trials without regard for the reliability of the evidence, and without concern for whether defense counsel has been given a reasonable opportunity to challenge the evidence. Without further consideration by this Court, states will remain free to mimic the tactics used by the prosecutor here to secure Gray's death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 1995, a copy of the foregoing Petition For Rehearing and Suggestion For Rehearing In Banc was hand delivered to John H. McLees, Jr., Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, counsel for Respondent-Appellant.

Paul G. Turner

December 1, 1995

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SUPREME COURT, U.S.

William Suter
Clerk of the Court
Clerk's Office
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

RE: Coleman Wayne Gray v. J.D. Netherland
Case No. 95-6510

Dear Mr. Suter:

Enclosed for filing please find the original of the Reply Brief of the Petitioner, as well as a Certificate of Service. The brief already has been faxed to the Court for distribution.

Thank you for your assistance in this matter.

Sincerely,

Donald R. Lee, Jr.

DRL/spb

Virginia Capital Representation Resource Center
The Heritage Building, 1001 East Main Street, P.O. Box 506, Richmond, Virginia 23204-0506 Telephone: (804) 643-6845; FAX: (804) 643-6819

No. 95-6510

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

COLEMAN WAYNE GRAY

Petitioner

versus

J.D. NETHERLAND, WARDEN

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CERTIFICATE OF SERVICE

I, Paul G. Turner, a member of the Bar of this court, do hereby certify that three copies of the foregoing Reply Brief for Petitioner were hand-delivered to John McLees, Esq., Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, Virginia 23219 on this the 1st day of December, 1995.

Paul G. Turner